

David Albers (owner/operator)
Vintage Dairy
ACL Complaint No. R5-2011-0542

HEARING PANEL REPORT AND PROPOSED ORDER

This matter was heard on July 14, 2011 in Fresno, California before a panel consisting of Central Valley Regional Water Quality Control Board (Central Valley Water Board) Members Karl Longley, Sandra Meraz, and Dan Odenweller. Alex Mayer and Ken Landau were Hearing Panel Advisors. [David Albers appeared on behalf of himself (Discharger). Clay Rodgers, Dale Essary and Ellen Howard appeared for the Prosecution Team.

The Hearing Panel makes the following determinations:

FINDINGS OF FACT

1. The Discharger is the managing partner and owner of the Vintage Dairy located at 12103 W Elkhorn Avenue, Riverdale, CA 93656, County of Fresno..
2. The Dairy is regulated by the Waste Discharge Requirements General Order for Existing Milk Cow Dairies, Order R5-2007-0035 (hereinafter General Order), which was issued by the Central Valley Water Board on 3 May 2007. Monitoring and Reporting Program R5-2007-0035 (hereinafter MRP) accompanies the General Order. The General Order and the MRP contain reporting requirements for dairies regulated by the General Order. The General Order became effective on 9 May 2007.
3. The General Order and the MRP required that an Annual Report for the calendar year 2008 be submitted for regulated facilities by 1 July 2009 (2008 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with modifications implemented to date; documentation of interim facility modifications completed for storage capacity and to balance nitrogen; components of a Nutrient Management Plan; a Salinity Report; manure manifests; new wastewater agreements; and domestic and irrigation well groundwater monitoring results for the samples collected by November 2008.
4. The General Order and the MRP required that an Annual Report for the calendar year 2009 be submitted for regulated facilities by 1 July 2010 (2009 Annual Report), including the following components: a revised Annual Dairy Facility Assessment, with facility modifications implemented to date; and a status on facility retrofitting completed as proposed in the Nutrient Management Plan submittal that was due 1 July 2009.
5. The General Order required regulated facilities to submit a Waste Management Plan (WMP) by 1 July 2009. The General Order was amended by Order R5-2009-0029 to modify the compliance schedule, extending the deadline to submit the WMP to 1 July 2010 in order to give regulated parties additional time to come in to compliance. The WMP is required to have the following components: a retrofitting plan, with schedule, needed to improve storage capacity, flood protection, or design of production area; maps of the production area and land

application area; a wastewater storage capacity evaluation; a flood protection evaluation; a production area design/construction evaluation; and documentation that there are no cross connections.

6. On 23 July 2009, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2008 Annual Report with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
7. On 25 August 2009, the Central Valley Water Board staff attempted to contact David Albers by telephone, and left a voicemail message stating that the Board had not received the required 2008 Annual Report with appurtenant components. On 31 August 2009, Mr. Albers contacted Board staff by telephone and indicated that the overdue report would be submitted by 20 August 2009.
8. On 17 March 2010, the Executive Officer issued Conditional Early Settlement Offer R5-2009-0585-M (Offer) to the Discharger. (Exhibit D.) The Offer provided the Discharger with an opportunity to settle the violation identified above through an expedited settlement process. The Offer provided the Discharger the option of accepting the conditions of the Offer by waiving the right to a hearing before the Central Valley Water Board, submitting the past-due 2008 Annual Report with appurtenant components, and paying a penalty in the amount of two thousand dollars (\$2,000), by 31 March 2010. If the Discharger accepted the Offer, the Central Valley Water Board would consider the identified violation resolved. On 30 March 2010, the Discharger submitted the signed acceptance of the Offer and waiver of right to a hearing. On 13 April 2010, the Discharger submitted the \$2,000 penalty. However, the Discharger did not submit the required 2008 Annual Report with appurtenant components. The Discharger therefore did not meet all the conditions of the Offer.
9. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the 2009 Annual Report with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
10. On 16 August 2010, the Central Valley Water Board staff issued a Notice of Violation, notifying the Discharger that the Waste Management Plan with appurtenant components had not been received. The Notice of Violation also requested that the delinquent report be submitted as soon as possible to minimize potential liability.
11. Central Valley Water Board's compliance tracking system and case files indicate that the Board has not received the 2009 Annual Report or the Waste Management Plan.

12. On 6 December 2010, the Central Valley Water Board staff issued a letter informing the Discharger that staff was in the process of assessing civil liability for failure to submit the Annual Reports and the Waste Management Plan. The letter provided the Discharger the opportunity to submit any information regarding the factors listed in CWC section 13327 that would be deemed relevant to determining an appropriate monetary penalty. The letter requested that all responses be received by 31 December 2010. As of the date of issuance of this Complaint, the Central Valley Water Board has not received any response to staff's 6 December 2010 letter.
13. CWC section 13268(a)(1) states that "Any person failing or refusing to furnish technical or monitoring reports as required by subdivision (b) of Section 13267...is guilty of a misdemeanor and may be liable civilly in accordance with subdivision (b)."
14. CWC section 13268(b)(1) states that "Civil Liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) of Chapter 5 for a violation of subdivision (a) in an amount which shall not exceed one thousand dollars (\$1,000) for each day in which the violations occurs."
15. On 5 May 2011, the Executive Officer issued Administrative Civil Liability Complaint (Complaint) No. R5-2011-0542 to the Discharger recommending that the Central Valley Water Board assess the Discharger an administrative civil liability in the amount of \$19,800 pursuant to CWC section 13268 for the failure to submit the 2008 Annual Report, the 2009 Annual Report and Waste Management Plan as required by the General Order.
16. The Discharger violated the requirements of the General Order and MRP by failing to submit the 2008 Annual Report by the required deadline of 1 July 2009. As of the date of the Complaint, the 2008 Annual Report was 673 days late.
17. The Discharger violated the requirements of the General Order and MRP by failing to submit the 2009 Annual Report by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
18. The Discharger violated the requirements of the General Order and MRP by failing to submit a Waste Management Plan by the required deadline of 1 July 2010. As of the date of the Complaint, the 2009 Annual Report was 308 days late.
19. On 17 November 2009 the State Water Resources Control Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy establishes a methodology for assessing discretionary administrative civil liability. Use of the methodology addresses the factors used to assess a penalty under CWC section 13327 including the Discharger's culpability, history of violations, ability to pay and continue in business, economic benefit, and other factors as justice may require.

The required factors under CWC section 13327 have been considered using the methodology in the Enforcement Policy as explained in detail in Attachment A and shown in the Penalty Calculation for Civil Liability spreadsheet in Attachment B. Attachments A and B are attached hereto and incorporated herein by reference.

20. In general, violations of CWC section 13267 are assessed on a per day basis. Under the Enforcement Policy, an alternate approach to the penalty calculation for multiple day violations may be used if the regional board makes express findings that the violations do not cause daily detrimental impacts to the environment, result in no daily economic benefit that can be measured on a daily basis or occurred without the knowledge or control of the violator. Here the failure to submit the required reports does not cause a daily detrimental impact to the environment and does not result in an economic benefit that can be measured on a daily basis, so the alternative approach is appropriate. Under this alternate approach, daily penalties are assessed for the first day of violation, plus one day for each 5-day period of violation until the 30th day, plus a one-day assessment for each additional thirty-day period of violation. In accordance with the alternative approach, a total of 28 days of violation have been assessed for the failure to submit the 2008 Annual Report, and a total of 16 days of violation each have been assessed for the failure to submit the 2009 Annual report and a WMP.
21. On considering the written record and evidence presented at the hearing, the Hearing Panel determined that \$19,800 should be imposed on the Discharger pursuant to CWC section 13268 for violations of CWC section 13267.

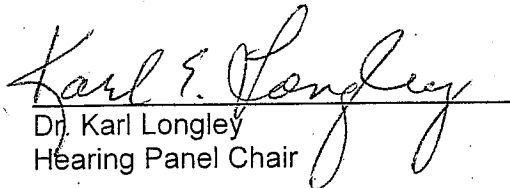
CONCLUSIONS OF LAW

1. The failure to submit the 2008 Annual Report constitutes a violation of CWC section 13267.
2. The failure to submit the 2009 Annual Report constitutes a violation of CWC section 13267.
3. The failure to submit the Waste Management Plan constitutes a violation of CWC section 13267.
4. Pursuant to CWC section 13268, the Central Valley Water Board may impose administrative civil liability up to \$1,000 for each day of violation.
5. The total maximum amount of administrative civil liability assessable for the violations alleged in Complaint No. R5-2011-0542 pursuant to CWC section 13268 is \$1,289,000.

HEARING PANEL REPORT
Vintage Dairy
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RECOMMENDED ADMINISTRATIVE CIVIL LIABILITY AMOUNT

The Hearing Panel recommends that the Central Valley Regional Board impose administrative civil liability in the amount of \$19,800 on the Discharger for violations found herein to have been committed by the Discharger. A proposed ACL Order is attached.


Dr. Karl Longley
Hearing Panel Chair

August 22, 2011
Date

Attachment A Enforcement Policy methodology
Attachment B Penalty Calculation for Civil Liability spreadsheet
Proposed Administrative Civil Liability Order R5-2011-XXXX